STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

Supreme Court No. 147743
Court of Appeals No. 308244
Lower Court No. 10-10892-FH

ROBERT RICHARD-HOWARD NELSON,

Defendant-Appellant.
_____/

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147743

PEOPLE'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

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COUNTER-STATEMENT OF JURISDICTION

On June 18, 2014, this Honorable Court issued an Order which stated, in relevant part, as follows:

> "On order of the Court, the application for leave to appeal the July 30, 2013 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. ... ***The parties shall submit supplemental briefs within 42 days of the date of the order appointing counsel ... addressing the defendant's claim of ineffective assistance of trial counsel.***"[1] (Emphasis added).

Upon information and belief, an Order appointing counsel in this matter was issued by the Bay County Circuit Court on June 25, 2014. Hence, this brief is being filed in compliance with the 42-day time limit set by this Honorable Court in the above-quoted Order.

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[1] A copy of said Order is attached hereto as **Appendix A.**

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS HONORABLE COURT *DENY* DEFENDANT'S APPLICATION FOR LEAVE RELATIVE TO HIS INEFFECTIVE ASSISTANCE CLAIM?

The People answer, "Yes"

Defendant presumably answers, "No"

COUNTER-STATEMENT OF FACTS

The facts of this case were set forth with great particularity in the "Statement of Facts" portion of the People's *Brief on Appeal.* Said brief was originally filed in the Court of Appeals; then, said brief was submitted to this Court in response to defendant's *in pro per* Application for Leave to Appeal. Hence, the People will simply rely on same at this point.

It should be noted, however, that in the "Trial Testimony" subsection of the "Statement of Facts" portion of the aforementioned brief, the People stated they were relying on the "Statement of Facts" contained in defendant's Court of Appeal's brief because defendant's brief had set forth all of the trial testimony in great detail.[2] Consequently, and in the interest of completeness, the People are attaching the relevant portion of the "Statement of Facts" from defendant's Court of Appeals brief hereto.[3]

Additional facts may be found in the body of this brief.

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[2] *See, "Plaintiff-Appellee's Brief on Appeal"* at p.12. Of course, the People continue to object to those portion's of defendant's "Statement of Facts"in his COA brief that were clearly argumentative. *See, id,* at n.70.

[3] *See,* **Appendix B.**

ARGUMENT

I. THIS HONORABLE COURT SHOULD *DENY* LEAVE IN THIS MATTER RELATIVE TO DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIM BECAUSE: (A) THE COURT OF APPEALS CORRECTLY FOUND COUNSEL WAS *NOT* INEFFECTIVE RELATIVE TO THE OTHER ACTS EVIDENCE; (B) COUNSEL EFFECTIVELY MITIGATED THE IMPACT OF DEFENDANT'S CONFESSION DURING CROSS-EXAMINATION OF TROOPER KUROWSKI; AND, (C) NEITHER OF DEFENDANT'S TWO NEW ARGUMENTS IN SUPPORT OF HIS INEFFECTIVE ASSISTANCE CLAIM MERIT RELIEF.

STANDARD OF REVIEW

The People rely on the standard of review set forth in their *Brief on Appeal* which was submitted to this Court in response to defendant's *in pro per* Application for Leave to Appeal.

DISCUSSION

In his *pro per* Application for Leave to Appeal, defendant claims he was denied the effective assistance of counsel. In support of this claim, defendant relies on two arguments and/or issues that were brought up on direct appeal – namely, counsel's interjection of other acts evidence at trial,[4] and defendant's confession to Trooper Kurowski.[5] Defendant also raises two completely new arguments in support of his ineffective assistance claim – namely, that counsel should have introduced the victim's CAC interview at trial,[6] and that counsel should have called Brenda Lapan as a witness at trial.[7] None of these arguments,

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[4] *See*, Defendant's Pro Per Application for Leave to Appeal at pp.2; 4.

[5] *Id* at 3.

[6] *Id* at 6-7.

[7] *Id* at 7.

either separately or collectively, justify the granting of leave relative to the issue of ineffective assistance of counsel here.

Before addressing the aforementioned arguments, the People would reiterate that when it comes to claims of ineffective assistance, defendant ***must*** satisfy ***both*** prongs of the applicable test – i.e., "defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms, ***and*** (2) that, but for his attorney's error or errors, a different outcome reasonably would have resulted."[8] The People would further reiterate that "not every mistake is a foolish one."

A. The Other Acts Evidence.

Without question, defense counsel was absolutely mistaken in believing defendant had been charged with two (2) separate CSC offenses rather than with one (1) CSC offense under two alternative theories.[9] However, as correctly found by the Court of Appeals, this mistaken belief did *not* result in counsel rendering ineffective assistance here.

Specifically, with reference to the first prong of the applicable test, the Court of Appeals found "this limited error by defense counsel (which he corrected in his closing statement) [did] not warrant reversal when viewed in light of counsel's overall performance, which did not fall 'outside the wide range of professionally competent assistance.'"[10] This finding was absolutely correct because counsel's overall performance included a valid and

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[8] *People v. McCauley*, 287 Mich App 158, 162; 782 NW2d 520 (2010)(emphasis added).

[9] Tr Vol II at 23; 28-46. *See also, Slip Op* at p.2 ("Defense counsel was clearly wrong in his assertion that the camping trip outside Bay County was a *charged offense*.")(Emphasis in original text).

[10] *Slip Op* at p.2 (footnote and citations omitted).

logical defense strategy which was ***supported*** by the other acts evidence:

> ". . . Evidence of the other acts directly supported the defense strategy. As noted by the trial court, evidence of the other acts tended to 'show that [the victim] reports things that didn't happen or reports them differently than they did.' Defense counsel also used the other-acts evidence to attempt to show that the victim's mother was a liar who was inconsistent, jumped to conclusions, coached her daughter to embellish, and had a personal vendetta against defendant. Counsel implemented this strategy, throughout the trial, repeatedly finding inconsistencies in both the victim and victim's mother's testimony and highlighting the victim's mother's propensity to jump to conclusions. Therefore, contrary to defendant's argument, trial counsel did present a reasonable defense to the charges..."[11]

Moreover, "it was precisely because of this strategy that the People did not seek admission of this other acts evidence under the statute[12] – i.e., because this other acts evidence could be used by defendant to effectively show [the victim's] 'disclosures' were less-than-accurate and/or were taken completely out of context by a lying, conniving mother with an axe to grind."[13]

Additionally, it was entirely reasonable for counsel to anticipate that the other acts evidence would come in any way if defendant (who was very unpredictable) took the stand and claimed the charged offense was an accident and/or claimed that he had never inappropriately touched the victim in the past and/or made some other unanticipated statement. Consequently, "by bringing up this evidence first, counsel was able to 'take the sting out of it' and effectively explain it away. This is the same type of strategy that is often

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[11] *Id. See also,* Tr Vol IV at 4-5 wherein the trial court correctly acknowledged that "defendant interjected [the other acts evidence] in this case and wanted to use it to show that the--the victim not only was fabricating the incident that's charged and is the subject of this trial, but had- -had done it- -the same thing in regard to another incident."

[12] MCL 768.27a(1).

[13] People's *Brief on Appeal* at p.7.

used in relation to prior criminal convictions – i.e., it is 'a trial strategy followed by defense attorneys who believe it less damaging to present this information [of prior criminal convictions] to the jury before the prosecution does so on cross-examination.'"[14]

Finally, like most CSC cases, this case boiled down to a credibility contest between defendant and the victim. As noted *supra*, the other acts evidence undermined the victim's credibility by uncovering a pattern of less-than-accurate "disclosures" regarding defendant's behavior. And, as correctly noted by the Court of Appeals, "[i]t [was] for the jury to determine the credibility of the witnesses appearing before it."[15]

Based on all the foregoing, it is abundantly clear that counsel's actions in placing the other acts evidence before the jury was not objectively unreasonable in light of all the facts and circumstances of *this* case. Hence, the Court of Appeals was absolutely correct in finding defendant had failed to satisfy the first prong of the applicable test.

Notwithstanding defendant's failure to satisfy the first prong of the applicable test, the Court of Appeals went on to find defendant had also failed to satisfy the second prong of the applicable test as well. In so doing, the Court of Appeals properly recognized that: (1) the other acts evidence was not the only or even the strongest evidence of defendant's guilt; and, (2) the other acts evidence was admissible in any event.

With reference to the other acts evidence not being the only or even the strongest evidence of defendant's guilt, the Court of Appeals correctly noted that: (1) after physically demonstrating the difference between "inside" and "outside" using a pen and cup, the

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[14] *Id* at pp.6-7 (footnote and citation omitted).

[15] *Slip Op* at p.3, citing *People v. Drohan*, 264 Mich App 77, 89; 689 NW2d 750 (2004).

victim testified that defendant touched her *inside* her crotch; and, (2) the victim gave a physical demonstration of exactly where defendant touched her.[16] The Court of Appeals further correctly noted that defendant had confessed to a state trooper that he [defendant] "had 'touched the .... skin of [the victim's] private area one time.'"[17] The Court of Appeals further correctly noted that the victim had made statements to the SANE nurse which incriminated defendant – namely, that defendant had touched her "inside and out," and that defendant had asked her if she "like[d] it."[18] Finally, the Court of Appeals correctly noted defendant had "conceded on cross-examination that he had put his hand underneath the victim's underpants and that he knew it was wrong."[19] Hence the Court of Appeals was absolutely correct in concluding, "[t]here was ample evidence adduced regarding the [charged] incident to support a finding of guilt." In other words, the other acts evidence was simply icing on the cake.

With reference to the other acts evidence being admissible in any event, the Court of Appeals correctly noted that the other acts evidence was admissible under the statute.[20] More importantly, the Court of Appeals also correctly noted that the other acts evidence would have passed muster under the MRE 403 balancing test given that "'courts must weigh the propensity inference in favor of the evidence's probative value rather than its

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[16] *Slip Op* at p.3.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] MCL 768.27a.

prejudicial effect.'"[21]

Based on all the foregoing, it is clear the Court of Appeals was absolutely correct in finding defendant had failed to satisfy the second prong of the applicable test.

Given that defendant failed to satisfy either prong of the applicable test, it is clear the Court of Appeals committed no error when it found defendant was not denied the effective assistance of counsel as a result of counsel's interjection of the other acts evidence into trial. Hence, this Honorable Court should deny leave regarding this issue.

2. Defendant's Confession.

In his Pro Per Application for Leave to Appeal, defendant cites to pages from his Court of Appeals Brief and to various portions of the trial transcript which deal with his confession to Trooper Kurowski.[22] To say the People do not know why defendant is raising this issue and/or how same supports his ineffective assistance claim is an understatement. This is particularly true given that *the People* relied on counsel's cross-examination of Trooper Kurowski to illustrate how counsel's overall performance ***was*** effective here.[23] Specifically, during his cross examination of Trooper Kurowski, counsel was able to cast serious doubt on the trooper's credibility and/or on the reliability of the trooper's recollection regarding defendant's interview and defendant's confession.[24]

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[21] *Slip Op* at 5, quoting *People v. Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012).

[22] Defendant's Pro Per Application for Leave to Appeal at p.3.

[23] *See*, People's Brief on Appeal at pp.33-35.

[24] *Id. See also,* Tr Vol II at 163-187; Tr Vol IV at 65-69.

3. The Two New Arguments Regarding Ineffective Assistance.

In his Pro Per Application for Leave to Appeal, defendant has raised two new arguments in support of his ineffective assistance claim – namely, that counsel was ineffective for failing to introduce the victim's CAC interview into evidence, and that counsel was ineffective for failing to call Brenda Lapan as a witness. Neither of these arguments justify the granting of leave because neither argument supports a finding of ineffective assistance here.

a. Failure to Introduce the CAC Interview.

According to defendant, the CAC interview was "crucial evidence" because it showed the victim giving a "3rd version of what happened in the water."[25] The People will attempt to address this sketchy argument as best as possible.

Firstly, the CAC interview was not part of the record so this Honorable Court has no way of knowing whether the victim did in fact give a "3rd version of what happened in the water" as alleged by defendant.

Secondly, "what happened in the water" involved the camping/swimming incident, ***not*** the charged offense. Hence, any attempt by defendant to introduce the CAC interview for purposes of showing the victim gave a "3rd version of what happened in the water" would have been an improper attempt to impeach the victim with extrinsic evidence regarding a collateral matter.[26] Of course there is an exception to this "impeachment with extrinsic evidence" rule whereby "a party may introduce rebuttal evidence to contradict the

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[25] Defendant's Pro Per Application for Leave to Appeal at pp.6-7.

[26] *See*, MRE 608(b) which prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant or immaterial matters.

answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements."[27] However, defendant has failed to argue – much less demonstrate – how admission of the *entire* CAC interview would have fallen within this very narrow exception.

Thirdly, if defendant had been allowed to have the entire CAC interview admitted into evidence for the purpose of showing how the victim told a "3rd version of what happened in the water," then the People would have been entitled to bring in an expert witness to testify about the continuing and/or evolving nature of children's disclosures. Such expert testimony would have been very detrimental to the defense because it would have provided an explanation for many (if not all) of the inconsistencies in the victim's testimony.

Fourthly, the record indicates there was an agreement between counsel and the prosecution whereby counsel was going to enter the DVD of the CAC interview into evidence.[28] However, counsel subsequently indicated he was no longer seeking to have said DVD admitted into evidence.[29] While the record is silent as to why counsel ultimately decided not to have the DVD of the CAC interview admitted into the evidence, the reason seems rather obvious – i.e., given that the People readily agreed to its admission into evidence, the CAC interview was far more inculpatory than exculpatory.

Fifthly, counsel did use information from the CAC interview to impeach the victim

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[27] *People v. Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003).

[28] Tr Vol III at 153-154.

[29] *Id.*

regarding various inconsistent statements she made to "Jill."[30] In so doing, counsel was able to use the CAC interview to his full advantage without allowing any of the inculpatory statements therein to be admitted into evidence.

Finally, using the CAC interview to demonstrate that the victim gave different and/or varying accounts of what happened would have been merely cumulative of other evidence already in the record. Hence, any error in counsel's failure to have the CAC interview admitted into evidence was absolutely harmless.[31]

Needless to say, counsel was not ineffective when he decided against having the DVD of the CAC interview admitted into evidence. As a result, this Honorable Court should deny leave as to this issue.

b. Failure to Call Brenda Lapan as a Witness.

Defendant's second new argument in support of his ineffective assistance claim is that counsel should have called Brenda Lapan as a witness at trial. According to defendant, Ms. Lapan "could have verified [the victim] has been involved in other situations that were found to be untrue. She was also told directly by Angie, who witnessed the zipper incident, the situation as it had happened."[32] This argument is wholly without merit for several reasons.

First and foremost, defendant fails to disclose who this "Brenda Lapan" person is

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[30] "Jill" refers to CAC interviewer Jill Kroll who interviewed the victim. *See, e.g.,*, Tr Vol III at 35-36; 46.

[31] *See, e.g., Baidee v. Brighton Area Schools*, 265 Mich App 343, 357; 695 NW2d 521 (2005)("An error resulting from the exclusion of cumulative evidence is harmless.").

[32] Defendant's Pro Per Application for Leave to Appeal at p.7.

and how she's related to this case. The People have reviewed their file and the only mention of Ms. Lapan was on defendant's witness list – i.e., Ms. Lapan was listed thereon, but her address was unknown.[33]

Secondly, the fact that Ms. Lapan "could have verified [the victim] has been involved in other situations that were found to be untrue" is wholly irrelevant. Not only does defendant fail to allege that Ms. Lapan actually had personal knowledge of those "other situations," but defendant fails to disclose what those "other situations" entail. Did the victim deny taking cookies after being caught red-handed with her hand in the cookie jar? Or, did the victim win at Chutes and Ladders by cheating? What, exactly, did this child victim do that embroiled her in "other situations that were found to be untrue?" Moreover, if those "other situations" involved things of a sexual nature, then Ms. Lapan's testimony would have been barred by the rape shield statute.[34]

Finally, any information that Ms. Lapan received from "Angie" was clearly hearsay and defendant has failed to allege (much less establish) the existence of an applicable exception.

Needless to say, defendant has completely and utterly failed to establish any ineffective assistance based on counsel's failure to call the elusive Ms. Lapan as a witness at trial. Hence, this Honorable Court should deny leave regarding this issue.

CONCLUSION

All of the foregoing clearly demonstrates that defendant simply does not have a

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[33] A copy of said Witness List is attached hereto as **Appendix C.**

[34] MCL 750.520j.

viable ineffective assistance claim here. Not only was the Court of Appeals absolutely correct in finding that counsel was not ineffective for interjecting the other acts evidence into trial, but neither counsel's handling of defendant's confession to Trooper Kurkowski nor counsel's "failure" to have the CAC interview admitted into evidence nor counsel's "failure" to call Ms. Lapan as a witness amounted to ineffective assistance. Hence, this Honorable Court should deny leave regarding the issue of ineffective assistance of counsel.

RELIEF REQUESTED

WHEREFORE, for all of the reasons herein stated, the People respectfully request that this Honorable Court ***DENY*** Defendant-Appellant's Application for Leave to Appeal, and that this Honorable Court grant any and all relief it deems fair and just.

Respectfully submitted,

BAY COUNTY PROSECUTOR'S OFFICE

Dated: July 22, 2014

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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

-vs-

ROBERT RICHARD-HOWARD NELSON,

Defendant-Appellant.
_____/

Supreme Court No. 147743
Court of Appeals No. 308244
Lower Court No. 10-10892-FH

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF BAY)

Ann Briggs being first duly sworn, deposes and says that on July 23, 2014, she mailed to this Court, via regular first-class mail, eight (8) copies of the following for filing:

PEOPLE'S SUPPLEMENTAL BRIEF

PROOF OF SERVICE

and that she mailed one (1) copy of same, via regular first-class mail, to:

WENDY H. BARNWELL (P42505)
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65 Cadillac Square - Suite 2605
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Ann F. Briggs
ANN F. BRIGGS

Subscribed and sworn to before me
July 23, 2014.

Diane Jaworski
Notary Public, Bay County, Michigan
My commission expires: 1-31-19

APPENDIX A:

Michigan Supreme Court Order, dated 06/18/2014.

Order

Michigan Supreme Court
Lansing, Michigan

June 18, 2014

147743

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 147743
COA: 308244
Bay CC: 10-010892-FH

ROBERT RICHARD-HOWARD NELSON,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the July 30, 2013 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). We ORDER the Bay Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint attorney Wendy Barnwell, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court. If the defendant is not indigent, he must retain his own counsel. The parties shall submit supplemental briefs within 42 days of the date of the order appointing counsel, or of the ruling that the defendant is not entitled to appointed counsel, addressing the defendant's claim of ineffective assistance of trial counsel. The parties should not submit mere restatements of their application papers.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 18, 2014

Clerk

APPENDIX B:

Trial testimony portion of the "Statement of Facts" from Defendant's Court of Appeals Brief.

The court then ruled that since the alleged incidences were introduced to the jury by defense counsel, defense counsel had essentially opened the door for questioning of witnesses by the prosecution as to the other uncharged incidences, even though there was no 404b notice given by the prosecution. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 45, 46).

TRIAL TESTIMONY OF PAIGE McKEE

Paige McKee testified that she lived at 400 West Ionia, Bay City, Michigan, with her grandmother, Judith Nelson, her uncle Robert Nelson (the defendant), Eric who is her husband (then fiancé), her daughter Kylie Karpinski, and son, Mason McKee, in the summer of 2010. She indicated that Kylie's date of birth was August 10, 2004, and that Kylie was 5-years old in the summer of 2010. McKee indicated that she lived there off and on for a while because she had split up with her husband. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 50, 51, 52). Notably, on cross-examination, Paige McKee indicated that she had lived on and off with Judith Nelson since the death of her own mother in 2004, and since Kylie's birth (in 2004). (TR, Jury Trial, Vol. II, 10/19/2011, pp. 63, 64) .

According to Paige McKee, she had walked into Kylei's bedroom one day, she noticed that the door was closed. When she entered Kylie and Robbie were sitting at her table, and when Kylie stood up, she observed that Kylie's zipper was undone. As a consequence, when her grandmother Judith Nelson returned home, there was a meeting between her (Paige), Judith Nelson, Kylie, and Robbie. During that meeting, there was an agreement that no doors would be closed when they were in the bedrooms. Paige

McKee stated that she was satisfied with the answers she got during the meeting. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 54, 55).

She had moved out since the zipper incident, and had gone over to Judith Nelson's home about a camping trip to Pinconning State Park that Judith Nelson refused to take them on. Judith Nelson had bought a motor home. She was supposed to go on a camping trip with Judith Nelson, along with other people , including her husband Eric, Kylei, and Mason. Judith Nelson had told her that she would not be taking Kylei on the camping trip because the neighbor's 9-year old daughter, Kendra, had told her (Kendra's) parents that Kylei had told her (while they were together on a previous camping trip) that "if Robbie kept touching her then my mom said he's gonna go to jail." (TR, Jury Trial, Vol. II, 10/19/2011, pp. 56, 67). Paige McKee acknowledged on cross-examination that she had learned through Judith Nelson about the alleged statements Kylie made to Kendra. (TR, Jury Trial, Vol. II, 10/19/2011, p. 67).

When hearing about the accusation from Judith Nelson, Paige McKee stated that she went home to 3201 Lauria (where she was living at the home of Kylei's paternal grandmother) and discussed the alleged touching with Kylei. Before arriving at Kathy's home, McKee stated that she called Kathy and asked her to bring Kylie inside so that she could talk to her immediately when she arrived. (TR, Jury Trial, Vol.II, 10/19/2011, pp. 57, 69-72, 98, 115). Following is an excerpt of Paige McKee's testimony as to Kylei's tearful admission when confronted by her mother (Paige):

-"A. 'Cause I had made a phone call on my way back from my grandmother's house to get Kylei inside because I needed to talk with her. I was upset at that point.

When I walked into the house, Kylei was sitting on the couch crying and so I took her into her grandmother's bedroom and I had talked with her and she had said that, yes, Robbie had touched her on the camping trip. They were in a pond or in a lake and he had put his fingers inside her bathing suit."

(TR, Jury Trial, Vol. II, 10/19/2011, p. 58, lines 10-18, see also Id. p. 69, pp. 73, 98).

Defense counsel cross-examined Paige about how the subject was broached once she had made contact with Kylei when she entered the paternal grandmother's house, as is stated in the following excerpt:

"Q. When you got to Kathy's house, your intent in going there was to talk to Kylei about this allegation.

A. Yes. ***I grabbed Kylei*** off the couch and I took her in the bedroom and asked her about it.

Q. Okay. So- -So- -So, um, So, Kylei never approached you or went to you and told you about the inappropriate touching, did she?

A. No."

(TR, Jury Trial, Vol. II, 10/19/2011, p. 73, lines 2-9).

Unequivocally, Paige McKee's questioning of the young child Kylei was pressure-packed, and totally contrary to the Child Abuse Protocol. The child was terrified when questioned by her mother about the alleged incidences of abuse as was evident in the excerpts above and infra. McKee testified that Kylei "bawled" her eyes out during questioning. McKee acknowledged that she acted with aggression when she described having grabbed Kylei off the couch, as is excerpted in the prior paragraphs. (TR, Jury

Trial, 10/19/2011, pp. 73, 98). McKee denied coaching Kylie. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 125, 126, 130, 131). However, the amount of pressure and intimidation faced by the 5-year old had the same effect of contaminating the information revealed by the child. It appeared that even the therapist recognized that McKee was putting too much pressure on the child. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 123, 142,143). The therapist cautioned McKee not to "badger" Kylei about the alleged abuse. Following is an excerpt of McKee:

"Q. And after that incident of two weeks ago, did you ever sit down with your daughter and ask her to explain what- -what she meant by that?

A.No, I have not because- -I don't know if I can say it but, just because, um, like Nathan Weidner Center and ***her therapist said that if she wants to talk about it, she will; don't sit her down and basically badger her about it.***" Emphasis added.

(TR, Jury Trial, Vol. II, 10/19/2011, p. 123, lines 5-11, pp. 142, 143).

McKee stated that she took Kylie over to Judith Nelson's home and had Kylie talk to Judith Nelson about the camping incident. She then took Kylie back to the home of her paternal grandmother at 3201 Lauria. Paige McKee stated that she called and made a police report. Kylei was then taken to the hospital on September 1st after the police report was made. Paige McKee stated that she also took Kylei to the Nathan Weidner Center sometime in early September. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 60, 61, 71, 79, 83, 90).

Paige McKee stated that Kylei did not "open up too much" to her. She indicated that Kylei "did well at the Nathan Weidner Center talking with them" and "more or less

opened up to her father." Paige McKee denied telling Kylei what to say. (TR, Jury Trial, Vol. II, 10/19/2011, p. 62).

On cross-examination however, McKee acknowledged that she had testified at the preliminary examination that she was the first person that Kylie approached about the situation. She tried to reconcile the contradiction in her trial testimony by stating that she was nervous at the Preliminary Examination. McKee acknowledged that she testified at trial on direct examination that Kylei revealed to her in her paternal grandmother Kathy's bedroom that Robbie had touched her during the camping trip and at Judith's house. But she had indicated at the examination (because she was nervous and confused then) that she had not found out about the incident involving the chair at Judith's house until she was at the hospital with Kylei. After reading her examination testimony, Paige McKee declared her confusion about where Kylie actually told her about the touching that occurred on Judith's couch. She remained unsure whether it was in Kathy's (Kylie's paternal grandmother) room, at the hospital, or at the Nathan Weidner Center. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 74-78, 99, 101, 103, 104,117, 141, 146, 147).

Paige McKee acknowledged that Judith Nelson had invited Kylie and had previously taken her on a camping trip along with Robbie, Austin, and Kendra. (TR, Jury Trial, Vol. II, 10/19/2011, p. 59).

On cross-examination, Paige McKee denied that she jumped to conclusions about the zipper incident. She acknowledged that once she questioned Kylei, she realized that Kylie had gone to the bathroom, and had forgotten to zip up her pants once she had finished using it. Kylie had never changed her story regarding the zipper. She indicated

that the camping trip with Kylie, Judith Nelson, Robbie Nelson, Kendra and her brother Austin occurred later on in August of 2010, about one month after she married Eric. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 64, 65, 66).

Paige McKee testified that she and Eric had gone away on their honeymoon on their own separate camping trip the same weekend that Kylie went camping with Judith Nelson and the others. (TR, Jury Trial, Vol. II, 10/19/2011, p. 67).

On cross-examination, Paige McKee was nonresponsive when counsel asked her whether Judith's confrontation of Eric about not contributing to the household caused them to suddenly move out in late July. In response, McKee defended Eric, stating that Eric had contributed by doing "handiwork left and right" for Judith. She did however acknowledge that Eric was "employed off and on all the time", doing "odd jobs off and on all the time." (TR, Jury Trial, Vol. II, 10/19/2011, pp. 79-81).

Further, on cross-examination, Paige McKee, acknowledged that she remembered Judith Nelson telling her that she would not go camping with them "because of what Kylei had said." (TR, Jury Trial, Vol. II, 10/19/2011, p. 83).

During defense counsel's cross-examination of Paige McKee, several unfavorable 404b facts were unnecessarily brought out before the jury. When being asked to distinguish whether the touching happened in a couch or a chair, Paige McKee testified that she could not remember what Kylei said, but that Kylie and Robert were always cuddling together. McKee stated that "Kylei- -Kylei loved him. She always wanted to cuddle with him."(TR, Jury Trial, Vol. II, 10/19/2011, p. 86). Paige McKee, in continuously being badgered about whether or not the touching happened on the couch or

on a chair, indicated that she believed "it's happened more than what she's even leadin' on to." (TR, Jury Trial, Vol. II, 10/19/2011, p. 90).

Defense counsel continued to open up the door to more adverse testimony by specifically asking Paige McKee whether there were more than 2 allegations of inappropriate touching, as follows:

"BY MR. CZUPRYNSKI:

Q. Do you know of more than two instances from any other source? Is it two or only two?

A. *But see, I don't know if that could be counted as a third because when we went trick-or-treating at the State Park, we walked (sniffs) - - we walked by the - -the playground and she turned and looked at me and said, Ma, look, there's the playground.*

***

THE WITNESS: She said, Look, Ma, *there's the park where Robbie did things to me at.*"

(TR, Jury Trial, Vol. II, 10/19/2011, p. 91, line 25, p. 92, lines 1-18, pp. 93-95).

Paige McKee testified that she spoke to Trooper Kurowski at the hospital. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 97, 143).

TRIAL TESTIMONY OF TROOPER KUROWSKI

Jay Kurowski testified that he was a Michigan State Trooper. He indicated that he was on duty on September 1, 2010, at approximately 11:45 A.M., when he was dispatched to the Bay Regional Medical Center on a criminal sexual conduct complaint. Kurowski testified that he spoke with 4 individuals in investigating the allegations--Paige

McKee, Judith Nelson, Robbie Nelson, and Kendra Latter. Upon his arrival, he met with Paige McKee. He spoke with McKee about where she was when she learned of the 2 incidences of criminal sexual conduct pertaining to her child Kylie. Defense counsel objected to the prosecution's elicitation of hearsay testimony from Trooper Kurowski regarding Paige McKee's statements to him about where she was when she *from Kylie* learned of 2 incidences of inappropriate touching. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 151-155, 163). The trial court overruled the objection, citing *People v Strickland*, acknowledging that "prior inconsistent statements are generally not admissible as substantive evidence. There are exceptions, however, and one is when there is a question about whether a prior inconsistent statement was made. And under that rule, I'll allow the question and answer as substantive evidence." (TR, Jury Trial, Vol. II, 10/19/2011, p. 155, lines 8-14).

Kurowski testified that Paige McKee told him that Kylei told her of 2 incidences of inappropriate touching --1 occurring on a camping trip and the other at home in Bay City. He believed that Paige stated that she learned about the 2 incidences at the home where she saw Kylei. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 155, 156,). Kurowski testified that he then contacted the Nathan Weidner Center to schedule a forensic interview. The interview was conducted at the Nathan Weidner Center on September 9th. The child was taken by the interviewer into a separate room where there is a 2-way mirror. A representative of the prosecutor's office and Kurowski observed the interview from a different room. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 156-158).

He then contacted Judith Nelson since he learned that she was responsible for the 22-year old Robbie. Judith Nelson came to the post with the defendant, Robbie on September 15th. Kurowski admitted that he interviewed Robbie Nelson after speaking with Judith Nelson. An interview was conducted by Kurowski that supposedly lasted for 45 minutes. However, the interview was reduced to less than half of a page. Kurowski characterized his police report as a condensation of the conversation occurring between him and Robbie Nelson. Even though the interview was conducted in a state-of-the-art room, modernly equipped with audio and video, Kurowski chose for no particular reason to not to use the equipment. Kurowski acknowledged that audio and video recording ensured accuracy of statements. Not only did he deliberately not record any part of the interview by video or audio, but he also admittedly did not take verbatim notes, and he further destroyed his handwritten notes once he completed his formal report. He testified that he "paraphrased"/"condensed" Robbie Nelson's statement, acknowledging that he may have possibly gotten some of the details wrong. He acknowledged that videotaping or audiotaping ensured accuracy. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 159-175, 190, 191). Following is an excerpt of Kurowski's testimony regarding his lack of use of video and audio recording equipment:

"Q. *Is there a special room at the State police Post for interviewing people*?

A.***There is a room outfitted with video and audio recording equipment.***

Q. Okay. That's - - That's for interviewing people.

A. Yes.

Q. ***And was it in that room that you interviewed my client***?

A. *Yes.*

Q. Okay. Now, you told the jury that that room is equipped with video and audio taping capabilities.

A. Yes.

Q. Why?

A. For the purposes if- -if an officer or detective wanted to record an interview.

Q. ***So the recording equipment, both video and- -and audio, is to allow a- -actual videotaping and audiotaping of an interview for--for clarity and completeness.***

A. *Yes.*

Q. And ***accuracy.***

A. *Yes.*

Q.And did you utilize those taping capabilities in this case?

A. ***No, I did not.***

Q. Why not?

A. I chose not to. No particular reason."

Emphasis added. (TR, Jury Trial, Vol. II, 10/19/2011, p. 165, lines 13-25, p. 166, lines 1-12).

Kurowski admitted that he has since used the video and audio equipment in the State Police post since litigation on this case began, as is evident in the following excerpt of his testimony:

"Q. *Have you ever utilized those taping- -taping capabilities in taking statements in that special interview room*?

A.***Since this incident, yes.***"

Emphasis added. (TR, Jury Trial, Vol. II, 10/19/2011, p. 165, lines 16-18).

Not only did Kurowski fail to record by video and/or audio, but he also disposed of his notes that he took prior to typing up his formal police report. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 165, 167, 168).

With respect to the specifics of what Robbie Nelson reportedly told him, Kurowski acknowledged that he never asked Robbie what he meant by "private area." He admitted that the defendant did not specify "vaginal area" or "crotch." Rather he indicated that Robbie Nelson told him that he was throwing Kendra and Kylei around in the water. In doing so, he grabbed both of them by their armpits and threw them in the water. He stated that he accidentally touched Kylie in the private area one time. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 170-172, 180). He then read to the jury his summarization of the statement made by Robbie Nelson, as follows:

"Robbie stated he was going to pick her up. She had a one-piece swimsuit on and he touched her under her swimsuit. He stated his right hand went inside her swimsuit from the right side, his left hand was under her arm pit. Robbie stated he touched the skin of her private area one time. Once he did it, he pulled his hand out. When asked if he meant to touch her, Robbie stated he did not."

(TR,Jury Trial,Vol. II,10/19/2011, p. 172, lines 20-25, p. 173, lines 1-3).

With respect to the allegations regarding what happened at Judith Nelson's home, Kurowski testified that Robbie said that Kylie had come from the kitchen table and had gone on the couch where he (Robbie) was. This happened when his mother Judith had

gone outside to water some flowers. On that occasion, Kylie laid her back on top of him, and he asked her to "do that thing." He then touched her "private area." When his mother returned inside, he got off of the couch. According to Kurowski, Robbie stated that he did not know why he had touched Kylie. (TR, Jury Trial,10/19/2011, p. 161).

On cross-examination, Kurowski admitted that Robbie did not define terms "private area", nor did he initiate or actually use the terminology "do that thing." Rather, Kurowski indicated that he (Kurowski) used the phrases "do that thing" and "private area" in the statement he procured from the defendant because Kylie had told him that that was the terminology used by Robbie. He admitted that he did not have an independent recollection of what Robbie had said, and further acknowledged that those were not the defendant's exact words. Kurowski admitted that both Kylie and Robbie referred to "private area" without any specificity as to what the term meant. (TR, Jury Trial, Vol. II, 10/19/2011, pp. 162, 173-175, 182-187,189).

TRIAL TESTIMONY OF KYLEI MADISON KARPINSKI

Kylei Karpinski testified that she was 7 years old at the time of her testimony, but was 5 years old 2 summers prior to her testimony. She testified that she lived at her grandmother, Judith Nelson's house at that time along with her mother, her brother, her grandmother and Robbie (the defendant). (TR, Jury Trial, Vol. III, 10/20/2011, pp. 7, 8).

Under direct examination, Kylei identified the "boobs", "crotch," and the "butt" as private parts that should not be touched by other people. (TR, Jury Trial, 10/20/2011, pp. 10, 11, 12).

She testified that she went camping with her grandmother, Robbie when Robbie touched the skin of her crotch with his finger. She did not remember Kendra being on the camping trip. Nor did she remember the camping trip. She indicated that she did not remember how it happened. She also indicated that Robbie touched her "in her crotch" with his hand at her grandmother's house, while she was on the couch and on the chair watching television. Under questioning, Kylei indicated that Robbie touched her under her clothes. She indicated that she told him to stop, but that he did not. She indicated that she told her mother, and she went to the hospital afterwards. She talked to a nurse at the hospital, and acknowledged on cross examination that she had also talked with Kristin. She testified that Jill was the first person she told after telling her mother. She testified that she told them what had occurred. (TR, Jury Trial, 10/20/2011, pp. 12-20, 25, 45, 46, 51).

However, Kylei testified that she only remembered when Robbie touched her when she was on the couch and did not remember anything about when she was on the chair. On cross-examination, Kylei stated that *Robbie put his finger inside her panties, but not on her crotch.* (TR, Jury Trial, Vol. III,10/20/2011, pp. 21,22, 23,32).

Defense counsel opened the door to the witness ineffectively bringing in other incidences of sexual touching as follows:

"Q. Okay. And when--when--when Robbie--you said he put his--his—his, ah, his finger was inside the waistband of your panties?

A.Yes.

Q. Okay. And it was in between the--the crotch and the--and the--and the top of the panties, right?

A. Yes.

Q. Okay. ***Was that the only time he ever did that?***

A. ***No.***

Q. ***What other time he did do that?***

A. ***I don't know, but he did it a lot of times.***

Q. ***A lot of times?***

A. ***Yes.***"

(TR, Jury Trial, Vol. III, 10/20/2011, p. 26, lines 2-14).

In response to defense counsel opening the door, the prosecution then asked (on redirect) whether she had testified that Robbie had touched her lots of times when she was on the couch and on the chair. Kylie again responded that Robbie had touched her lots of times. (TR, Jury Trial, Vol.III, 10/20/11, p. 48, lines 4-7)

Likewise, defense counsel continued to insist on cross examination of the child witness on prior testimony that was actually unfavorable to the defense:

"Q.Was it only in the chair?

A.Um, no. An--It was in - - on the couch, too.

Q.Okay. And on both--was it just once on the couch and once on the chair then?

A. No. It was more than once.

(TR, Jury Trial, Vol. III, 10/20/2011, p. 29, lines 3-7).

* * *

Defense counsel sought to cross examine the child on prior preliminary examination testimony that was unfavorable to the defense. Furthermore the prosecution had not even questioned the witness in this regard:

"Q. Do you remember two months ago when you--when you got on the chair and - -told what happened, do you remember at that time - -

A.No.

Q.Do--***Do you remember at that time saying when Robbie had touched you, he said- -he was like being quiet and he said, Ssh and some- -some stuff. Did he ever say those things or not***?

A.I don't know.

Q. Okay. Do you remember saying that two months ago?

A. No.

Q. Okay. So you- -just to be clear, you never- -you never said that- -that ***Robbie told you "Sssh, be quiet" or anything like that***?"

(TR, Jury Trial, Vol. III, 10/20/2011, p. 30, lines 18-25, p. 31, lines 1-11).

This above-excerpted questioning line of questioning by defense counsel was never broached by the prosecution at trial. Yet defense counsel insisted on cross examining the child about Robbie's demeanor which amounted to consciousness of guilt or consciousness of wrongdoing. There was no benefit to the defendant to cross-examine the child about his (Robbie's) efforts to keep his behavior a secret. ***Id.***

TRIAL TESTIMONY OF YVETTE HURD

Yvette Hurd testified that she was working as a registered nurse and as a Sexual Assault Nurse Examiner at the Bay Regional Medical Center when she saw Kylie on September 1, 2010. Hurd stated that she took a "history" from Kylie. According to Hurd, Kylie stated that Robbie put his hand in her pants, and that he touched her "inside and out." Hurd stated that Kylie stated that Robbie "put his hands inside my one piece" at a campground. She testified that Kylei mimicked pulling aside her bathing suit pant leg when making the statement. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 52-60).

Hurd also stated that she performed a physical examination on Kylie. She concluded that there were no physical findings or no "detectable trauma" made during the course of the examination. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 61-63).

TRIAL TESTIMONY OF DEFENDANT

Robbie Nelson was able to give a definition of the word "inappropriate", stating "it means you can't do that stuff to other people," and "You can't touch anybody in private stuff—area." He indicated that he recalled an incident where Paige came home, found Kylie's zipper unzipped and started accusing him and yelling. He stated that he had not done anything, and was angry and frustrated at Paige. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 66, 67).

Robbie testified that he did go on one camping trip with Kylie, his mother Judith, and Kendra, their neighbor on August 10, 2010. He described playing in the water with Kylie and Kendra, picking them up by their armpits and throwing them in the water. He indicated that he accidentally touched Kylie's butt when she was squirming around wiggling her feet as he was holding her up for his mother to take a photograph. He then

tossed her after his mother finished taking the photograph. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 71-75, 78, 85).

He indicated that his mother subsequently drove him to the station to talk with a state policeman. He stated that he was very nervous when he spoke to the officer. He testified that he never intentionally touched Kylie's private parts. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 75-78).

Robbie Nelson testified that it was essentially Kylie who initiated the inappropriate contact and maneuvered everything the same day after the camping trip. Robbie Nelson described the incident where his mother went outside to water the flowers, and Kylei, who was at the time, sitting at the living room table, came over to him, and asked him if he "wanted to do that thing." He testified that he told her "no." He stated that she then "grabbed a blanket off of our couch and my- - pull it over us and she tell me to rub her back then she flips over and rub her tu- -tummy and rub her belly and tell me to go down further. I said no."

(TR, Jury Trial, Vol. III, 10/20/2011, p. 79, lines 1-22).

Robbie continued to testify as follows:

"Q. Okay. Now, did- -did she ever ask you to rub her back or tummy in the past? Before that.

A. Yes."

(TR, Jury Trial, Vol. III, 10/20/2011, p. 79, lines 23-25).

* * *

"Q. Okay. Did you ever put your hands under her underpants?

A. Halfway, but I took it out really quick.

Q. I'm sorry?

A. I took it out really quick.

Q. Okay. And--And how did it get under the- -the underpants a little bit?

A. Because she told me to put it down- -put my hand down underneath her panties. A little bit."

(TR, Jury Trial, Vol. III, 10/20/2011, p. 80, lines 12-19).

The prosecutor cross-examined Robbie Nelson, and was able to get Robbie to admit that he did touch Kylie "a little" underneath her pants while he was at his mother's home. Robbie indicated that he knew it was wrong to touch Kylie in that manner because his mother told him that it was wrong. He admitted to speaking to Trooper Kurowski, Kendra's parents, but stated that he never told his mother nor Paige that he touched Kylie in the home. On re-cross-examination by the prosecution, Robbie stated that after the camping trip, he had a discussion with his mother only. During that discussion where they (he and his mother) were the only two people present, he told his mother that he had accidentally touched Kylie privates (specifically her butt only), when he was throwing her in the water. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 80-94, 98-103).

TRIAL TESTIMONY OF KENDRA LATTER

Kendra Latter testified that she was friends with Robbie, as her brother and Robbie played together, and rode their bikes together. She described Robbie as a "big brother" to her. She indicated that she would play "tag" with him and other friends at the park. Kendra also stated that she knew Kylie, after having met her at Robbie's house

when she went to tell her brother that he needed to go home for dinner. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 104-107).

Regarding the camping trip, Kendra testified that she remembered going on a camping trip with Kylie, Robbie, and Judith Nelson. Defense counsel questioned her about whether Kylie had ever divulged anything to her that she found alarming. In response, Kendra stated that Kylie had told her that "Robert was touching her in the wrong places."Kendra stated her disbelief, testifying that she had been alone with Robbie on other occasions and that he had never touched her inappropriately. Kendra indicated that she "kind of" knew what Kylie meant even though Kylie did not specifically state what Robbie was doing. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 108, 109,110).

Kendra testified that Kylie wanted Robbie to throw her in the water during their camping trip. But Kylie did not want Robbie to hold her by her armpits since it hurt. Robbie had to hold Kylie by her sides to throw her. Robbie also threw her (Kendra) in the water. Kylie never expressed that Robbie was doing anything inappropriate while they were in the water. But Kylie did tell her that Robbie had touched her in the wrong place as they were leaving the water. She never saw Robbie grab Kylie towards him. Nor did she see him touch Kylie inappropriately. She also found him to be honest, and did not believe that Robbie would inappropriately touch a young girl. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 110-113, 115).

Once more defense counsel began to introduce 404b evidence that was unfavorable to his client, Robbie Nelson. Counsel asked Kendra whether Kylie had told her about things that Robbie had done to her in the woods. The court overruled the

prosecution's objection. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 113, 114). Following is an excerpt of the exchange between defense counsel and the witness Kendra:

"Q. Now, in that conversation or during the camping trip, did- -did Kylie ever tell you that something happened in the woods with Robbie?

A.Yes.

Q. And what did she tell you?

A.She told me that Robert was touching her in the wrong areas when they went in the woods.

Q. Okay. Was it during that same camping trip?

A.No.

Q.You don't know when it was then?

A.No."

(TR, Jury Trial, Vol. III, 10/20/2011, p. 114, lines 15-25).

On cross-examination, Kendra conceded that she would not have been able to see Robbie's hands if they were in fact on Kylie underneath the water. However, she indicated that she was always watching Kendra and Robbie while they were in the water, and that she never went in the water by herself. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 115-117).

TRIAL TESTIMONY OF RICHARD LATTER

Richard Latter testified that he was the father of Kendra Latter. He testified that he knew Robbie Nelson for about 3 to 4 years. He indicated that he and his daughter and

son frequently went fishing with Robbie, played softball, and video games with Robbie, and watched movies with him. (TR, Jury trial, Vol. III, 10/20/2011, pp. 120, 121, 124).

Richard Latter testified that his daughters have spent time alone with Robbie from time to time, and that he had no concerns. He felt that he knew Robbie well, and that he was a father figure for Robbie who had no father in his life. (TR, jury Trial, Vol. III, 10/20/2011, pp. 122, 123, 125).

TRIAL TESTIMONY OF NAOMIE LATTER

Naomie Latter indicated that Robbie interacted with her two children. She indicated that she had let Kendra go on one trip with Robbie and his mother. But she, her husband and children had also gone on camping trips with Judith Nelson and Robbie. She in fact socialized with Judith Nelson, and considered Robbie to be a person of good morals. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 125-130).

TRIAL TESTIMONY OF JUDITH NELSON

Judith Nelson testified that she adopted Robbie Nelson when he was only 18 months old. Judith Nelson testified that Robbie Nelson had 'some mental impairments." Judith Nelson testified that Robbie was a recipient of Social Security Disability, and that his mental capabilities had been assessed. The prosecution objected when defense counsel questioned Judith Nelson about the finding of the social security judge as to Robbie's IQ. Their objection was on the basis that the subject of the defendant's IQ would be beyond the scope of the court's ruling that occurred at the beginning of the trial. Defense counsel pointed out that the findings of the Social Security judge were not limited IQ, but also included findings as to cognitive reasoning and communication skills.

The court sustained the objection, indicating that defense counsel could question Judith Nelson directly about "whether or not the defendant would testify in a manner that might be misunderstood because his reactions might not be that of an average person." The court indicated that counsel could question Judith Nelson about Robbie's communication skills based on her own knowledge and observation. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 132-134).

Judith Nelson testified that she had been the foster mother to 62 children, and was required to take classes in order to care for special needs children from the Department of Social Services. She received special training at Delta that included classes regarding special needs children. She also had to take classes to update her knowledge. Even though she had legally adopted Robbie at 18 months, he was in her care as her foster son since he was 3 months old. She testified that Robbie did not have the same communication skills as other people did. He not only had a speech impediment, but he also had trouble with abstract thinking. Judith Nelson testified that when questioned, Robbie might "pick up on certain key words in a sentence and respond to that," and would fail to respond to the exact sentence as it was asked. She testified that he would be easily confused. However, she stated that Robbie was very honest. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 135-140).

Judith Nelson testified that she raised Robbie to have good morals. He still attended church every Sunday, and was well aware of the Ten Commandments. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 140, 141).

Regarding the 2010 camping trip to Camp Covenant, Covenant Hills, in Otisville, Judith Nelson testified that Paige McKee insisted that she take Kylie along on a camping trip so that she (Paige) could have an adult weekend with her new husband. Kylie went along on the trip. Nelson testified that she was with the children at all times. She stated that Kylie never told her that Robbie had done anything inappropriate. She (Judith) has in fact asked Robbie to hold Kylie up in the water so she could take a photograph of Kylie in the water for Paige. The three of them (Robbie, Kylie, and Kendra) stayed together because the water in that area was deep. She did see Robbie throw Kendra and Kylie in the water a couple of times. She told Robbie to stop tossing the girls because she had just incurred a large chiropractor bill after he had fallen flat on his back at the Imagination Station.(TR, Jury Trial, Vol. III, 10/20/2011, pp. 142, 143, 144).

When they returned to Bay City after the camping trip (August 29, 2010), she dropped off Kendra and she unloaded the RV. They settled in the home, and she was about to play puzzles with Kylie at the dining room table when she looked outside, and saw that her flowers were wilting in the heat. She told both Kylie and Robbie that she would run outside to water the flowers really quickly. She then ran outside and watered them. She was outside and was gone for a maximum of 5 or 6 minutes. When she returned, she saw Robbie getting up from the couch and picking up an afghan, and Kylie was moving away from the couch. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 144, 145, 168, 169).

Kylie did not express any concern about anything when she came back in from watering the flowers. She indicated that Paige picked Kylie up about 45 minutes later.

After they left, she receive a phone call from Mrs. Latter, indicating hearsay information that Kendra said that Kylie had told her regarding Robbie touching her inappropriately in the woods. The prosecution objected on the basis of hearsay. The court overruled the objection, but gave a cautionary instruction to the jury that the matter was not being offered for the truth asserted but rather as it gave meaning "to why the witness took the next step that she took." (TR, Jury Trial, Vol. III, 10/20/2011, pp. 146-148).

After Paige picked up Kylie, Judith Nelson and Robbie went to Kendra's house to get the information. When Paige came to pick up some extra things, she made a comment about Kylie having a "good time," and she inquired about going camping with Nelson the coming weekend. Nelson testified that she then told Paige that they would not go camping with her since she had to get to the bottom of allegations made by Kylei to Kendra. Paige then got on the phone and told the person she was speaking with to have Kylei get in the house so she could talk to her when she got there. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 148, 149, 167).

Paige left, and came back about 2 hours later with Kylie. Nelson stated that she had Kylei sit on her lap, and had her tell her what had happened. She thought that everything had been resolved. But one week later, she received notice that Robbie was to meet with the police. The police contacted her and told her they had to meet at the State Police post. She then took Robbie to the State police post. The police officer spoke with her for about 5 to 6 minutes. Before the trooper spoke with Robbie, Judith Nelson told him that she wanted to be present. The officer told her that she could not be present. (TR, Jury Trial. Vol. III, 10/20/2011, pp. 149-152, 167, 169).

Additionally, defense counsel brought up the incident where Kylie's "fly" being open. Judith Nelson indicated that she had heard about the accusation after-the-fact after returning home from work. She indicated that Kylie, Paige, Robbie, and Angie (the cousin of Paige's fiancé) were present during the zipper incident. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 170, 171, 180).

Judith Nelson testified that she had a central role in raising Kylie's mother, Paige, until Paige turned 15 years, at which time Paige moved out, giving birth to Kylie at age 17 years. Paige continued to move in and out of her home. At one time, in 2008, Paige moved into her home with her fiancé, Eric McGee, and their small baby, Mason, stayed for 18-months (at which time Kylie was 4 years old), and moved back out, staying away for a 5-month period, and moved back in, in February 2010. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 172-176, 181).

Judith Nelson stated that she was very upset by the fact that she was burdened with all the food and household bills. Eric and Paige were practically living off of her. Even though Eric did help her with some home improvement in the upstairs bathroom and the garage, and Paige did at one time give her $100, they did not adequately contribute. One day she could not contain herself, and she told them they had to contribute or leave. They left and the relationship became cold and distant. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 176-179, 182, 183). She characterized Paige as being dishonest. (Id., p. 205).

On cross-examination, Judith Nelson testified that she taught Robbie not to touch people's private areas, as she taught all the children she raised. (TR, Jury Trial, Vol. III, 10/20/2011, p. 184).

The defense brought a Motion for Directed Verdict which the court ruled was well-preserved. The defense argued that Count 1, should be dismissed since there was "no showing that actual contact was made." The judge denied the motion, stating that the evidence was sufficient when taken in the light most favorable to the people. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 163-166).

Defense counsel then proffered the testimony of other witnesses, including Angela Holmquist, Timothy Heffner, and Tammie Heffner, who essentially testified that they knew Robert Howard through his mother Judith Nelson. They had either lived with the Nelsons (for example, Angela Holmquist), or were the neighbors or were co-workers (the Heffners). They all testified to Robbie Nelson's honesty, even though they were unable to comment about his mental disability. (TR, Jury Trial, Vol. III, 10/20/2011, pp. 187-191, 196-203).

ARGUMENT

I.DEFENDANT WAS DEPRIVED OF HIS 6TH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND WAS DEPRIVED OF HIS 14TH AMENDMENT RIGHT TO DUE PROCESS WHEN DEFENSE TRIAL COUNSEL (1) SOUGHT TO INTRODUCE UNFAVORABLE 404B EVIDENCE IN HIS OPENING STATEMENT AND ALSO IN HIS QUESTIONING OF THE MAJORITY OF WITNESSES, AND (2) NEVER REQUESTED THE COURT TO VOIR DIRE THE DEFENDANT ABOUT KNOWINGLY AND INTELLIGENTLY WAIVING HIS 5TH AMENDMENT RIGHT TO REMAIN SILENT BEFORE THE MENTALLY LIMITED DEFENDANT TESTIFIED.

APPENDIX C:

Defendant's List of Witnesses, and Proof of Service, dated 08/30/2011.

Jordan

SEP 2 2011

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

PEOPLE OF THE STATE OF MICHIGAN,
PLAINTIFF,

Vs.

File Number 10-10892-FH
HON. JOSEPH K. SHEERAN

ROBERT RICHARD-HOWARD NELSON,
DEFENDANT.

BAY COUNTY PROSECUTOR'S OFF.	*BAY JUSTICE ASSOCIATES, P.C.*
By: Kurt C. Asbury, P36595	By: Edward M. Czuprynski, P34114
Attorney for Plaintiff	Attorney for Defendant
1230 Washington Avenue	814 N. Monroe
Bay City, MI 48708	Bay City, MI 48708
(989) 895-4185	(989) 894-1155

DEFENDANT'S LIST OF WITNESSES,
AND PROOF OF SERVICE

Defendant, Robert Nelson, submits the names of the following individuals who may be called to testify for the defense at trial:

1. All persons named by the People as potential witnesses.
2. All persons named in the Information report on this case.
3. All persons who appeared at the preliminary examination on this case.
4. All persons named or otherwise identified in the police reports related to this case.
5. Jodi Corsi, MSP Crime Lab Bridgeport
6. Yvette Hurd, Bay Medical – Human Resources
7. Donald Karpinski
8. Kylei Karpinski
9. Trooper Jay Kurowski, Michigan State Police Post 31
10. Kendra Latter, c/o Naomi Latter 200 Crump, Bay City, MI 48706
11. Naomi Latter, 200 Crump, Bay City, MI 48706

12. Richard Latter, 200 Crump, Bay City, MI 48706

13. Paige McKee, address unknown

14. Trooper James Moore, Michigan State Police Post 31

15. Judith Nelson, 400 Ionia, Bay City, MI 48706

16. Tim Heffner, 1203 Raymond, Bay City, MI 48706.

17. Tammy Heffner, 1203 Raymond, Bay City, MI 48706.

18. Margo Davies, 1109 14th St., Bay City, MI 48708.

19. Angie Holmquist, 256 Winding Brook Dr., Leonard, MI 48367.

20. Jennifer Stakdosa, 2395 S. Huron Rd., Kawkawlin, MI 48631

21. Brenda Lapan, address unknown.

22. Barber Drive, address unknown.

23. Tim Fish, Resource Counselor, MPA, 1217 S. Euclid, Bay City, MI 48708.

24. *Please take notice pursuant to MRE 803 (24) and 804 (7) that the Defendant intents to introduce the statements of every witness contained in the police reports provide by the prosecution, whether hearsay or otherwise.*

Respectfully submitted,
BAY JUSTICE ASSOCIATES, P.C.

Dated:August 30, 2011

Edward M. Czuprynski
Attorney for Defendant

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon the parties named herein at the addresses disclosing on the pleading, by U.S. Mail, hand-delivered, or by depositing in their box at the Courthouse on:

[redacted]

EMC/kab

BAY COUNTY PROSECUTING ATTORNEY
KURT C. ASBURY

Victim's Rights Advocates

Cindy A. Howell
Wendy D. Hoffard
Kristin M. Monaghan

Assistant Prosecuting Attorneys

Nancy E. Borushko
Chief Assistant

J. Dee Brooks
Barbara J. Hayward
John C. Keuvelaar
Margaret A. Leaming
Sylvia L. Linton
Jordan Case
Jeffrey D. Stroud

July 23, 2014

Michigan Supreme Court
Clerk of the Court
Michigan Hall of Justice
925 W. Ottawa Street
Lansing, MI 48909

RE: People v. ROBERT RICHARD-HOWARD NELSON
Supreme Court No. 147743
Court of Appeals No. 308244
Lower Court No. 10-10892-FH
(Appeal from Bay County)

Dear Clerk:

Enclosed for filing, please find eight (8) copies of the People's Supplemental Brief, and Proof of Service, regarding the above-captioned matter.

Thank you for your attention to this matter.

Sincerely,

Ann Briggs for/

Sylvia L. Linton (P42125)
Assistant Prosecuting Attorney

Enc.

cc: Wendy H. Barnwell, Attorney for Defendant-Appellant

BAY COUNTY COURT FACILITY, 1230 WASHINGTON, STE. 768, BAY CITY, MICHIGAN 48708

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